If that was the position and, if on the true construction of the letters we have already set out, her solicitors had concluded an open contract for her it seems to us that by her signing the engrossed Transfer she had ratified the bargain made by her solicitors.

So far as the appellant is concerned, the evidence was that she was never asked by her solicitors to agree to the terms of, nor did she sign, the draft contract sent by the respondent's solicitors to her solicitors. Even if her solicitors had, by the correspondence, concluded an open contract for her, there was no evidence whatever that she authorised her solicitors to negotiate and conclude such a bargain for her. There was also no evidence whatever that she ratified the unauthorised bargain struck by her solicitors, nor can such an inference be drawn from all the evidence. The law is settled that solicitors are not, in the absence of specific authority, agents of their clients to conclude a contract for them. (see *Lockett* v. *Norman-Wright;*[1] *Eccles* v. *Bryant*[2] and *D'Silva* v. *Lister House Development Ltd.*[3]

Unfortunately, it would appear from the Record of Appeal that this vital question was never brought to the attention of the trial judge. In our judgment, the respondent had failed at the trial to prove that there was a binding agreement between her and the appellant for the sale of No. 95, Jalan Senang and her claim against the appellant for damages for breach of contract for the sale and purchase of No. 95, Jalan Senang ought to have been dismissed. That being so, it becomes unnecessary for us to consider the other grounds raised in this appeal and in the result the appeal is allowed with costs here and in the court below.

Appeal allowed.

Solicitors: *L.A.J. Smith; Khattar, Wong & Partners.*

THE "AMERICAN ASTRONAUT"; KIAN HIN HANG (PTE) LTD. v. "AMERICAN ASTRONAUT" OWNERS & ORS.

[O.C.J. (Choor Singh J.) January 5, 1979]
[Singapore — Admiralty *In Rem* No. 454 of 1975]

Shipping Law — Container — 580 cartons of toilet soap packed in sealed container — Short-delivery — Claim for loss of 205 cartons of toilet soap — Bills of lading — Conditions attached — United States Carriage of Goods by Sea Act, 1936, s. 3(3), (4) & (8) — Evidence Act (Cap. 5), s. 115.

Bill of Lading — Conditions "shipper's load and count" and "shipper's load, stowage and count" stamped on bill of lading — Effect of — United States Carriage of Goods by Sea Act, 1936, s. 3(3), (4) & (8) — Evidence Act (Cap. 5), s. 115.

The plaintiffs in this case, holders of a bill of lading issued in New York claimed $16,912.50 as damages against the defendants for short delivery of 205 cartons of toilet soap. Under the said bill of lading, 580 cartons of toilet soap were shipped on board the first defendant's vessel the "American Astronaut" for carriage from New York to Singapore. The said 580 cartons were transhipped at Hong Kong for delivery to Singapore on board the second defendant's vessel "American Mist."

Evidence showed that the "American Mist" discharged its cargo at Godown No. 48 at the Port of Singapore wharf. On December 5, 1974 the container was opened and its contents were unpacked by a contractor employed by Anglo-French Co. Pte. Ltd., the Singapore agents for the owners of the "American Astronaut." The contractor supplied tally clerks and labourers for the operation. No representative of either the P.S.A. or Anglo-French Co. Pte. Ltd., or the consignees of the cargo was present when the container was opened.

On December 6, 1974 when the plaintiffs' delivery clerk went to Godown No. 48 to take delivery of 580 cartons of Camay soap consigned to his company, he found only 375 cartons in the godown. There was correspondence between the plaintiffs and the P.S.A. but to no avail. The 205 missing cartons could not be found. The defendants did not call any eyewitness who was present when the container was opened and its contents unpacked. The contractor employed for this operation was not called. The defendants contended, *inter alia*, that the bill of lading did not yield *prima facie* evidence of the number of cartons that had been shipped from New York because of the conditions stamped on the bill of lading — "shipper's load and count" and "shipper's load, stowage and count."

The bill of lading applied the terms, provisions and conditions of the United States Carriage of Goods by Sea Act, 1936. Section 3(3)(c) of the said Act provides: "... no carrier ... shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground..." to doubt. Section 3(4) provides that the bill of lading shall be *prima facie* evidence of receipt by the carrier of the goods.

Held, allowing the plaintiffs' claim: (1) if a carrier were to doubt a statement of the shipper, he should not inscribe on the bill of lading the statement he doubts;

(2) to issue a bill of lading containing statements of the number of cartons and their weight and then to qualify them by such phrases as "shipper's load and count" would be contrary to section 3(3)(c) of the United States Carriage of Goods by Sea Act, 1936;

(3) such phrases as "shipper's load and count" were a form of non-responsibility clause and were contrary to section 3(8) of the said Act;

(4) it is fundamental that where a carrier receives a container packed and sealed by the shipper, the carrier has no right to open it on his own, and if he does, as in this case, he becomes liable for any shortage of the goods stated in the bill of lading;

(5) the failure to call the contractor or any of his staff (who was responsible for unpacking the container in question) to testify as to the number of cartons of soap found in the container raised the presumption under section 115 of the Evidence Act that if called their evidence would have been unfavourable to the defendants;

(6) the plaintiffs were not disentitled by the conditions in the bill of lading from relying on the admission that cartons to the number stated in the bill of lading were packed. The defendants were accordingly under an obligation to deliver the full number of cartons.

Cases referred to:-

(1) *Spanish American Skin Co.* v. *M.S. Ferngulf* [1957] A.M.C. 611.

(2) *Canada & Dominion Sugar Co. Ltd.* v. *Canadian National (West Indies) Steamships Ltd.* [1947] A.C. 46.

(3) *A.G. of Ceylon* v. *Scindia Steam Navigation Co.* [1962] A.C. 60.

ADMIRALTY *IN REM.*

K.C. Chan for the plaintiffs.

G. Punnirselvam for the defendants.

Choor Singh J.: In this action the plaintiffs claimed damages for the loss of cargo shipped from New York to Singapore in a container.

The plaintiffs claimed $16,912.50 being the cost of 205 cartons of toilet soap shipped from New York on the defendants' vessel "American Astronaut" and

which the defendants failed to deliver at Singapore. In the alternative, the plaintiffs claimed damages for breach of contract.

Under a bill of lading issued in New York dated October 8, 1974 there was shipped on board the first defendant's vessel the "American Astronaut" 580 cartons of toilet soap for carriage from New York to Singapore. The said 580 cartons were transhipped at Hong Kong for delivery to Singapore on board the second defendant's vessel "American Mist".

The plaintiffs claimed that they were at all material times the owners of the said goods and/or holders of the aforesaid bill of lading and/or consignees of the said goods and/or persons who were entitled to present the said bill of lading and take delivery thereunder. The plaintiffs claimed that the first and/or second defendants short-delivered 205 cartons of the said toilet soap and claimed $16,912.50 being the value of the 205 cartons which were short-delivered.

The defendants' defence was that the said goods were packed in a sealed container; that the said container was delivered in Singapore in the same good order and condition as when shipped; that they thereby fully and duly performed their duties under the said bill of lading; and that they were not liable in law for any short-delivery.

The evidence showed that the "American Mist" discharged its cargo at Godown No. 48 at the Port of Singapore Authority wharf. Amongst the cargo discharged was container No. 4127077 consigned to the plaintiff company. The container was taken into Godown No. 48 where it was opened on December 5, 1974 and the contents were unpacked and stacked in Godown No. 48. In the container was cargo belonging to other consignees. All the cargo found in container No. 4127077 was stacked in a designated area. On December 6, 1974 the plaintiffs' delivery clerk went to Godown No. 48 to take delivery of the 580 cartons of Camay soap consigned to his company. He tallied the cartons as they were put on his lorry. There were only 375 cartons in the godown. He took delivery of the 375 cartons and reported to his employers that the remaining 205 cartons were missing. There was correspondence between the plaintiffs and the P.S.A. but to no avail. The 205 missing cartons could not be found in Godown No. 48.

On December 5, 1974 when the container was opened and its contents unpacked and stacked in Godown No. 48, Anglo-French Co. Pte. Ltd. were the Singapore Agents for United States Lines Incorporated, the owners of the "American Astronaut" and the "American Mist". The container was opened and its contents were unpacked by a contractor employed by Anglo-French Co. Pte. Ltd. The contractor supplied tally clerks and labourers for that operation. It would appear that no representative of either the P.S.A. or Anglo-French Co. Pte. Ltd. or the consignees of the cargo was present when the container was opened.

The evidence also showed that the P.S.A. stores cartons in certain designated areas in the godown. All cargo from the same container is stacked in one lot whether the cargo is marked or unmarked. Subsequently when the consignee arrives with a delivery order, he goes to the allotted area of which he is advised by the ship's local agent and there he identifies and collects his cargo. The P.S.A. does not witness the loading of the cargo on the consignee's lorry. But P.S.A. officers and security guards do make spot checks on consignee clerks taking delivery from P.S.A. godowns. This does not prevent a consignee's man from taking away other people's cargo although a final check is done at the "Out" gate by the P.S.A. police.

The defendants did not call any evidence apart from a representative of Bangkok Bank Ltd. which bank had opened the Letter of Credit on the request of the plaintiff company.

There was no evidence to account for the shortage of the 205 cartons of Camay soap. The defendants did not call any eye witness who was present when the container was opened and its contents unpacked. The contractor employed for this operation by the defendants' local agent was a most vital witness in this case but he was not called nor were any of his clerks or labourers who unpacked the container called. There was no evidence before the court that the seal of the container was intact at the time it was opened in Singapore or that it had arrived in Singapore "in the same good order and condition as when shipped" as pleaded by the defendants. In fact there was no evidence at all that the container was ever sealed. The bill of lading does not state the seal number. The space for the seal number is blank on the bill of lading.

The bill of lading clearly mentioned not only the number of cartons but also the weight of the goods. The defendants' real defence was that they were not liable because the bill of lading was qualified as it bore the expression "House to Pier Container" and also "Shipper's load, stowage and count". It was contended on behalf of the defendants that in such a case all that the carrier represents is the receipt of a container and that the number of packages stated in the bill of lading is not binding on him.

The claim of the plaintiffs depended entirely on whether or not on a true construction of the bill of lading the plaintiffs had established that 580 cartons of toilet soap were shipped at New York on the defendants' ship "American Astronaut" for delivery to the consignees at Singapore. The onus of proving that fact undoubtedly rested upon the plaintiffs. It was pointed out by counsel for the defendants that the plaintiffs had chosen to rely for proof solely upon producing the bill of lading and that they had not called any witness from New York on this issue. Counsel further submitted that the bill of lading did not yield *prima facie* evidence of the number of cartons that had been shipped from New York because of the conditions stamped on the bill of lading — "shipper's load and count" and "shipper's load, stowage and count".

The bill of lading applied the terms, provisions and conditions of the United States Carriage of Goods by Sea Act, 1936, the American equivalent of the

Hague Rules. Subsections (3) and (4) of the said Act provide as follows: —

"3. (1) xxx xxx
(2) xxx xxx

(3) After receiving the goods into his charge the carrier or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among others things —

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: Provided, That no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs 3(a), (b) and (c) of this section...."

In the present case, it will be seen from the bill of lading, that on the face of it, there are two contradictory statements. First, the number and the weight of the cartons of toilet soap are stated. Secondly, this statement is qualified by the notation "shipper's load or count" and "shipper's load, stowage and count". In my judgment, if a carrier doubts a statement of the shipper, he should not inscribe on the bill of lading the statement he doubts. To issue a bill of lading containing statements of the number of cartons and their weight and then to qualify them by such phrases as "shipper's load and count" is contrary to section 3(3) last paragraph of the United States Carriage of Goods by Sea Act, 1936. Such phrases as "shipper's load and count" are a form of non-responsibility clause and are contrary to section 3(8) of the said Act because they relieve the carrier not only from liability under the Act generally but specifically from liability as "provided in this Act".

It was submitted by counsel for the defendants that the phrase "shipper's load, stowage and count" used in reference to containers, is a proper form of qualification where the carrier cannot verify the contents of a container packed and sealed by the shipper. I was unable to accept this submission. A carrier is under no obligation to "state or show in the bill of lading any marks, number, quantity or weight ... which he has no reasonable means of checking". See section 3(3)(c) of the United States Carriage of Goods by Sea Act, 1936. This was the position taken by the United States Court of Appeal in *Spanish American Skin Co.* v. *M.S. Ferngulf*.[1] The bill of lading bore the notation "Gross — Tare — Nett 6.8.2.8." "Shipper's Weight — Ship not responsible for weight, quality or condition of contents" and acknowledged receipt of 60 packages. Sixty packages were discharged, but there was found to be a substantial weight discrepancy. The U.S. Court of Appeal held that the bill of lading was *prima facie* evidence of receipt by the carrier of both number and weight. The carrier was responsible for the loss. The Carriage of Goods by Sea Act specifically provides a method for avoiding carrier liability for false information given by the shipper, by not stating it in the bill:

"The carrier must utilize that method rather than the quite general reservation attempted here. The purpose of the Act, to promote uniformity and negotiability of the ocean bills of lading includes a purpose to eliminate the practice of rubber stamp exceptions limiting carrier liability." (p. 614)

Counsel for the defendants relied on the decision in *Canada & Dominion Sugar Co. Ltd.* v. *Canadian National (West Indies) Steamships Ltd.*,[2] and also on *A.G. of Ceylon* v. *Scindia Steam Navigation Co.*[3] These two cases were decided on their own particular facts and in my opinion were of no assistance to the defendants. They were not "container" cases. Furthermore, in both these cases the question whether non-responsibility clauses, such as those used in this case, are contrary to section 3(8) of the Act and therefore invalid was never raised.

Counsel for the plaintiffs submitted that the plaintiffs acted on the representation in the bill of lading that there were 580 cartons of soap in the container; that to exclude liability the defendants should have stated "received one container" and not "580 cartons" and that accordingly the defendants were liable for the short-delivery. Counsel for the defendants, on the other hand, submitted that they were not liable and he relied on the following passage in *Scrutton* on Charter-Parties, 18th Edition at page 379: —

"... A container packed by the shipper is usually acknowledged as 'one container in apparent good order and condition said to contain (the contents) as declared by the shipper.' An acknowledgment in this form does not, it is thought, bind the carrier to any representation as to the condition or description of the contents so as to constitute an estoppel in favour of an indorsee of the bill of lading."

In my opinion this passage merely represents the thinking of the author of *Scrutton* on Charter-Parties. It is not supported by any reported decision and consequently does not carry any weight. In any case the defendants had clearly not used the very precise words of the suggested formula.

The defendants' case was that they had received a sealed container and had delivered it at Singapore in the "same good order and condition as when shipped". There was no evidence of this. The evidence showed that they had not delivered the container to the consignees. They had through their local agent opened it and unpacked it at Godown No. 48 behind the back of the consignees. They were not entitled to do this. They should have opened it in the presence of a representative of the consignees. The least they could have done was to ask an independent witness such as the storekeeper of Godown No. 48 or some other officer of the P.S.A. to be present when the contents of the container were unpacked and verified by the contractor employed by the defendants' local agent. The failure to call this contractor or any member of his staff to testify as to the number of cartons of soap found in the container raised the presumption under section 115 of the Evidence Act that if called their evidence would have been unfavourable to the defendants.

In my opinion, it is fundamental, that where a carrier receives a container packed and sealed by the

shipper, the carrier has no right to open it on his own, and if he does, as in this case, he becomes liable for any shortage of the goods stated in the bill of lading.

In my judgment, on the facts of this case and the law applicable, the plaintiffs were not disentitled by the conditions in the bill of lading from relying on the admission that cartons to the number stated in the bill of lading were packed in the container and the defendants were accordingly under an obligation to deliver the full number of cartons. On the evidence they had failed to do so. There had been a short delivery of 205 cartons for which the defendants were liable. The plaintiffs valued the 205 cartons at $16,912.50 which value was accepted by counsel for the defendants. Accordingly judgment was entered for the plaintiffs against the defendants in the sum of $16,912.50 and costs as taxed.

Claim allowed.

Solicitors: *Chan, Goh & Co.; Drew & Napier.*

MALAYSIAN REPORTS

GOVERNMENT OF PAKISTAN v. SENG PENG SAWMILLS SDN. BHD. & ORS.

[F.C. (Raja Azlan Shah, Wan Suleiman & Syed Othman F.JJ.) August 8 & October 11, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 18 of 1978]

Practice and Procedure — Injunction — Whether applicant has legal right — Privity of contract — Contract with foreign government.

Contract — Contract to purchase — Price already paid for — Misrepresentation by 2nd and 3rd respondents — 1st respondent not privy — Injunction against 1st respondent disallowed — Damages against 2nd and 3rd respondents.

The appellant sought an injunction to restrain the first respondent from removing various types of railway sleepers to enable the appellant to ship them to Pakistan. It was alleged that the appellant had entered into agreements with a company in Pakistan as agents for the second and third respondents for the purchase of the sleepers and that the second and third respondents had contracted to purchase the sleepers from the first respondent for shipment to Pakistan.

Held: (1) in this case on the facts there was nothing in the acts of the first respondent which would make it owe a duty to the appellant or give the appellant a legal right against the first respondent. The acts of the first respondent were all towards the second and third respondents;

(2) the learned trial judge was correct in refusing the injunction as the appellant had not shown that it had a legal right against the first respondent.

Case referred to:-

(1) *Fulwood* v. *Fulwood* (1878) 9 Ch. D. 176.

In the High Court at Kuantan the following judgment was delivered on January 19, 1978:

Abdul Razak J.: This is an application for an injunction to restrain the respondents from disallowing the applicant to remove certain railway sleepers which lay at Kuantan jetty. The applicant is the Government of Pakistan. The 2nd and 3rd respondents are residents in Singapore. The 1st respondent resides and deals in timber in Kuantan. The applicant alleged that an agreement was entered into between it and the 2nd and 3rd respondents for the purchase of sleepers. The 2nd and 3rd respondents had in turn made an agreement with the 1st respondent for the supply of the sleepers. It is alleged by the applicant that it had only received a part of the consignment of the goods contracted. It contended that the 1st respondent by his conduct had assented to the sale of his timber by the 2nd and 3rd respondents to it. The applicant had applied to the 1st respondent for delivery of the remaining consignment, but the 1st respondent said that all the timber had been delivered to the 2nd and 3rd respondents at the jetty in Kuantan. It alleged that the 2nd and 3rd respondents had received full payment for the total consignment. It was said that in oral conversation with the 1st respondent's counsel the latter made it clear that the 1st respondent would not release the remaining sleepers unless payment was made by the 2nd and 3rd respondents for the balance of the purchase price. The applicant had asked the 2nd and 3rd respondents for delivery but they only replied that they would not be responsible for any damage caused by any delivery to it at this stage. The applicant said that the 1st respondent could not